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No. 83-217

IN THE

Supreme Court of the United States

October Term, 1983

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Cross-Petitioner,

v.

MCI COMMUNICATIONS CORPORATION and MCI TELECOMMUNICATIONS CORPORATION,

Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO CROSS-RESPONDENTS' OPPOSITION

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REPLY TO CROSS-RESPONDENTS' OPPOSITION[1]

INTRODUCTION

In its conditional cross-petition, AT&T demonstrated that the Seventh Circuit's decision to affirm the district court's verdicts on MCI's FX and CCSA interconnection charges conflicts with decisions of this Court and other courts of appeals. The Court of Appeals failed to take adequate account of the impact of regulation on AT&T's conduct and the significance of the explicit

[1]The Statement Required by Rule 28.1 appears at p. ii of the Cross-Petition for Writ of Certiorari.

statutory mechanism that Congress has established to resolve interconnection controversies raising public interest questions: Section 201 of the Communications Act of 1934, 47 U.S.C. §201. This led the Seventh Circuit to commit the two separate but interrelated errors raised in the cross-petition.

MCI's Opposition seeks to avoid the whole question of the proper accommodation of the Sherman Act and the Communications Act, and, incredibly, does not even cite Section 201 of the Communications Act. MCI attempts to convey the impression that its right to the disputed connections for FX and CCSA services and the acknowledged public interest questions that allowing such connections then raised had been settled by the FCC in 1971. It contends that "the FCC's 1971 *Specialized Common Carriers* decision[2] found MCI's provision of the disputed services to be in the public interest, authorized MCI to provide these services, and obligated AT&T to provide the appropriate connections" (Opp. 2). This contention ignores the terms of the FCC's decision, the trial record, and the Seventh Circuit's decision. Indeed, the Court of Appeals held that the FCC's decision was "hardly a model of clarity" and that it "did not define the specialized services to which it referred, nor did it define the corresponding obligations that the FCC expected . . . AT&T . . . to assume in order to assist the new carriers" (App. 11a).[3]

Furthermore, contrary to MCI's suggestion that AT&T somehow discouraged MCI from invoking its Section 201 remedy before the FCC (Opp. 3), AT&T made it clear to MCI from the time of the *Specialized Common Carriers* decision that it was AT&T's position that MCI was not entitled to connections for

[2] *Specialized Common Carriers*, 29 F.C.C. 2d 870 (1971), *aff'd sub. nom. Washington Utilities & Transportation Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[3] "App." references are to the Appendix filed by cross-respondent MCI as petitioner in No. 83-32. In addition, "Tr." references are to the trial transcript and "DX" references are to AT&T's trial exhibits.

FX and CCSA. As the Seventh Circuit explicitly found: "AT&T contended, both at the time of the FCC decision and throughout the pendency of this lawsuit that the *Specialized Common Carriers* decision authorized only point-to-point private line services not requiring switched network connections . . ." (App. 11a).[4]

Even MCI and the FCC recognized at the time of the *Specialized Common Carriers* decision that this FCC decision did not authorize MCI to provide FX and CCSA services or to obtain the necessary connections. MCI joined in the FCC's statement in its October 1972 brief to the Court of Appeals for the Ninth Circuit, on review of the *Specialized Common Carriers* decision, that the decision "did *not* permit the offering of 'switched' service (such as FX and CCSA service)" (App. 241a).[5] MCI did not even formally raise the matter with the FCC until

[4]MCI thus misstates the record in asserting that AT&T assured it that "the connection issues would be amicably resolved" (Opp. 3). In two separate letters to the FCC early in 1973, AT&T reiterated the position taken at the time of the *Specialized Common Carriers* decision that it did not believe MCI was authorized to provide the disputed services and that AT&T would not provide the necessary connections (DX 955, 956). The December 1972 letter cited by MCI did not relate to the FX and CCSA "connection issues" but, instead, to negotiations for a new contract to govern the continued provision of local loops to MCI by the Bell operating companies, and specifically to the charge, rejected by the jury, that the prices for local loops were excessive or discriminatory. MCI further misstates the record in contending that AT&T did not advise the FCC of its decision to file tariffs with state regulatory agencies (Opp. 3). The then Chief of the FCC's Common Carrier Bureau, Bernard Strassburg, who was called by MCI as its witness, conceded that he had been advised of AT&T's plans in advance (Tr. 10048-52, 10057; see also Tr. 5596-5604).

[5]The State of Washington and the Washington Utilities and Transportation Commission—both of which were parties in the Ninth Circuit review proceedings—argue in their Brief Amicus Curiae in Nos. 83-21 and 83-32 that "the fact that MCI, the plaintiff below, interpreted the agency's decision in opposite ways on this point, depending on the court and MCI's purpose, justifies reversing the Court of Appeals' decision upholding the liability judgment" (p. 9).

October 1973. And as late as April 1974, shortly before the FCC resolved the controversy, the Court of Appeals for the Third Circuit vacated an injunction obtained by MCI that required AT&T to provide FX and CCSA connections, on the ground that there was a "legitimate dispute" on this question because the meaning of the *Specialized Common Carriers* decision was "unclear."[6]

This Reply addresses only two points. First, AT&T's cross-petition *is* proper under Rule 19.5. Second, the Seventh Circuit's affirmance of the trial court's refusal to instruct on the meaning of Section 201(a) squarely conflicts with the Fifth Circuit's holding that the absence of such an instruction is reversible error.

ARGUMENT

I. AT&T'S CONDITIONAL CROSS-PETITION IS TIMELY.

MCI begins its opposition by arguing that AT&T's cross-petition was not timely filed under Supreme Court Rule 19.5. MCI reasons that AT&T filed an earlier unconditional petition that presented a totally different question and that AT&T therefore had to file its cross-petition on the same date as its main petition. This is nonsense. AT&T's petition (No. 83-21) was confined to the narrow question whether, in the context of a non-final judgment, the Seventh Circuit erred in limiting the retrial of the remaining interconnection issues to damages only under this Court's decision in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931). This is an issue that does not require review of the record, but is essential to the conduct of further proceedings below.

In contrast, AT&T's cross-petition is conditional. It raises issues that this Court need reach now if, and only if, it decides to

[6] *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 496 F.2d 214, 224 (3d Cir. 1974), *vacating* 369 F. Supp. 1004 (E.D. Pa. 1973).

consider the substantive pricing and damages issues raised in MCI's petition. AT&T would have had no occasion to file this cross-petition if MCI had not raised these substantive issues in a petition of its own. The whole purpose of Rule 19.5 is to have parties hold off on filing such conditional cross-petitions for 30 days after the main petitions are due in order to eliminate the burden on the Court and the parties of protective and speculative cross-petitions that are filed on the due date for main petitions.[7] Furthermore, the substantive issues raised by MCI are so closely related to those raised by AT&T in its cross-petition that this Court should grant AT&T's cross-petition if it were to grant MCI's petition. MCI's proposed "interpretation" of Rule 19.5 would needlessly burden the Court's resources and improperly fragment consideration of this case.

II. THE INSTRUCTIONS SANCTIONED BY THE COURT OF APPEALS FAILED TO ACCOMMODATE THE SHERMAN ACT AND THE COMMUNICATIONS ACT.

MCI contends that "the jury was adequately instructed to consider whether AT&T's conduct was reasonable in the context of the FCC's regulation" (Opp. 4) and that "the trial court fully presented AT&T's regulatory policy defense" (Opp. 8). It seeks to support that contention by isolated references to the decision of the Fifth Circuit in *Mid-Texas Communications Systems, Inc.* v. *American Tel. & Tel. Co.*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980). However, the instructions below on regulation did not even mention the critical provisions of Section 201(a) of the Communications Act, much less the relevance of those provisions to AT&T's defense to MCI's FX and CCSA interconnection charges. In *Mid-Texas*, the Fifth Circuit reversed a jury

[7] In saying that "MCI has found no other instance in which a party which had already filed a petition also filed a cross-petition" (Opp. 5-6), MCI concedes that it has likewise found no instance in which the Court has dismissed a cross-petition where the party had previously filed an unconditional petition raising a different issue.

verdict precisely because the trial court failed to so instruct the jury on the "structure and effect" of Section 201(a) (615 F.2d at 1389).

The reason that instructions on Section 201 are essential to any fair resolution of an antitrust challenge to an interconnection denial follows from the explicit terms of Section 201 and the obvious Congressional purpose that carriers should deny interconnections that present substantial public interest questions. As the Fifth Circuit explained, under Section 201, it is the FCC that has the ultimate power "to determine whether a particular interconnection is in the public interest" (*id.*). Because "it is possible that in certain situations, interconnection will not be in the public interest," and because "public policy will be vindicated only if the interconnection is denied" (*id.*), Section 201(a) "places the initial onus of refusal on Bell" to avoid "an undesirable interconnection," thereby permitting the FCC to rule on whether the interconnection is in the public interest before such a connection is made (*id.* at 1380).[*]

The Seventh Circuit's holding that the complete omission of any reference to Section 201 in the instructions was not "fatal," because it only reflected a lack of "detail," cannot be supported. There was not a lack of "detail" in the instructions; there was no reference to Section 201 at all. The Seventh Circuit's decision, therefore, cannot be squared with the Fifth Circuit's holding that such an omission "is too central to be harmless error" (615 F.2d at

[*]MCI's witness, Bernard Strassburg, the former Chief of the FCC's Common Carrier Bureau, conceded at trial that the FX-CCSA controversy raised unresolved public interest issues within the FCC's area of responsibility (Tr. 10096-98). Moreover, contrary to MCI's assertion that Mr. Strassburg warned AT&T of the antitrust risks of its position on the interconnection controversies "months before the final refusal" (Opp. 4), Mr. Strassburg testified that "FX and CCSA just wasn't— . . . [i]t wasn't a specific issue" until the Fall of 1973 (Tr. 9917), at which time the FCC instituted a proceeding which promptly resolved the issue.

1390 n.16). MCI does not even attempt to reconcile the two decisions on this point. Instead, MCI argues that "in this case, unlike *Mid-Texas*, it was clear before AT&T's conduct was challenged in an antitrust court" that MCI was entitled to the disputed interconnections by virtue of the 1971 *Specialized Common Carriers* decision (Opp. 9 n. 11). However, that rationale is no rationale at all. It conflicts with the Third Circuit's holding, *after* this antitrust case was filed, that there was a "legitimate" dispute over FX and CCSA. It is further flatly contradicted by the fact that MCI and the FCC formally stated that the *Specialized Common Carriers* decision did *not* authorize these services at the time that the FCC's decision was issued. (see pp. 2-4, *supra*).[9]

Beyond these conflicts, the Seventh Circuit's decision was inherently unfair to AT&T. AT&T had to overcome a double hurdle to prevail on the FX-CCSA interconnection charge. First, the jury had to find that the *Specialized Common Carriers* decision had not ordered AT&T to provide FX and CCSA interconnections or, if it did, that AT&T did not know or have "good reason to believe they had been ordered to provide the interconnections" (App. 220a–221a). Second, even if it prevailed on those questions, AT&T still had to overcome the second hurdle posed by the court's instruction—based upon the 1977 *Execunet* decision decided three years after the fact and involving a different question—that "as a mater of law . . . at the time MCI requested FX and CCSA interconnections it was authorized to render those services" (App. 221a). In these circumstances, the only way in

[9]MCI erroneously argues that AT&T did not request an instruction requiring its conduct to be judged under a standard of objective reasonableness, and that even if it had, the Seventh Circuit's affirmance of the trial court's failure to give such an instruction is not in conflict with the decisions of other courts (Opp. 8-9). First, AT&T did request such an instruction. See, *e.g.*, Defendant's Proposed Instructions 17, 31, 39, 39A, 39B, 39C, 39D, 39E, 39', and 39C'. Second, the Fifth Circuit held in *Mid-Texas* that the jury must assess whether conduct subject to regulation "was reasonable . . . in light of the relevant factors concerning the public interest" (615 F.2d at 1390). See Cross-Pet. 17-18.

which the FX-CCSA question could have been fairly and properly resolved by the jury was if it had been instructed under a standard that required it to consider the objective reasonableness of AT&T's conduct in light of the provisions of Section 201(a) of the Communications Act *at the time that the conduct occurred*: between 1971 and 1974.

CONCLUSION

In the event this Court grants MCI's petition for writ of certiorari, it should also grant review of the questions presented in AT&T's cross-petition.

Respectfully submitted,

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